

CLARKE, J., TAFT, C. J., and DAY, J., dissenting. 258 U. S.

courts,—by the latter so recently as *Heller v. New York, N. H. & H. R. R. Co.*, 265 Fed. 192, and *American Ry. Express Co. v. Crabtree*, 271 Fed. 287.

The dimensions of the pool of poisoned water were about 20x45 feet. It was 2½ to 3 feet deep in part and in part 10 or more feet deep. A photograph in the record gives it the appearance of an attractive swimming pool, with brick sides and the water coming nearly to the top of the wall. The water is described by the witnesses as appearing to be clear and pure, and, on the hot summer day on which the children perished, attractively cool.

This pool is indefinitely located within a tract of land about 1,000 feet wide by 1,200 feet long, about which there had not been any fence whatever for many years, and there was no sign or warning of any kind indicating the dangerous character of the water in the pool. There were several paths across the lot, a highway ran within 100 to 120 feet of the pool, and a railway track was not far away. The land was immediately adjacent to a city of about 10,000 inhabitants, with dwelling houses not far distant from it. The testimony shows that not only the two boys who perished had been attracted to the pool at the time but that there were two or three other children with them, whose cries attracted men who were passing nearby, who, by getting into the water, succeeded in recovering the dead body of one child and in rescuing the other in such condition that, after lingering for a day or two, he died. The evidence shows that the water in the pool was highly impregnated with sulphuric acid and zinc sulphate, which certainly caused the death of the children, and that the men who rescued the boys suffered seriously, one of them for as much as two weeks, from the effects of the poisoned water.

The case was given to the jury in a clear and comprehensive charge, and the judgment of the District Court upon the verdict was affirmed by the Circuit Court of

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Appeals. The court charged the jury that if the water in the pool was not poisonous and if the boys were simply drowned there could be no recovery, but that if it was found, that the defendant knew or in the exercise of ordinary care should have known, that the water was impregnated with poison, that children were likely to go to its vicinity, that it was in appearance clear and pure and attractive to young children as a place for bathing, and that the death of the children was caused by its alluring appearance and by its poisonous character, and because no protection or warning was given against it, the case came within the principle of the "attractive nuisance" or "turntable" cases and recovery would be allowed.

This was as favorable a view of the federal law, as it has been until today, as the petitioner deserved. The Supreme Court of Illinois, on the authority of the *Stout Case*, held a city liable for the death of a child drowned in a similar pool of water not poisoned. *City of Pekin v. McMahon*, 154 Ill. 141.

The facts, as stated, make it very clear that in the view most unfavorable to the plaintiffs below there might be a difference of opinion between candid men as to, whether the pool was so located that the owners of the land should have anticipated that children might frequent its vicinity, whether its appearance and character rendered it attractive to childish instincts so as to make it a temptation to children of tender years, and whether, therefore, it was culpable negligence to maintain it in that location, unprotected and without warning as to its poisonous condition. This being true, the case would seem to be one clearly for a jury, under the ruling in the *Stout Case*, *supra*.

Believing as I do that the doctrine of the *Stout* and *McDonald Cases*, giving weight to, and making allowance, as they do, for, the instincts and habitual conduct of children of tender years, is a sound doctrine, calculated to

make men more reasonably considerate of the safety of the children of their neighbors, than will the harsh rule which makes trespassers of little children which the court is now substituting for it, I cannot share in setting aside the verdict of the jury in this case, approved by the judgments of two courts, upon what is plainly a disputed question of fact and in thereby overruling two decisions which have been accepted as leading authorities for half a century, and I therefore dissent from the judgment and opinion of the court.

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